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No. 90-703

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARTIN MITCHELL STEVENS

Petitioner,

v.

STATE OF OREGON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state court's decision not to provide an indigent father, incarcerated in another state, with funds to attend a parental rights termination hearing violate due process when the father's participation by telephone neither limits his counsel's ability to represent him nor affects the ruling terminating his parental rights?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent State of Oregon accepts petitioner's statement of the opinions below,[1] his statement of the constitutional provision involved, and his statement of jurisdiction as adequate for review.

STATEMENT OF THE CASE

The state supplements Stevens' Statement of the Case as follows: On August 9, 1988, the State of Oregon filed petitions in the trial court seeking termination of Stevens' parental rights with respect to his two minor sons. (Petitions for the Termination of Parental Rights). On the same day, the state filed petitions to terminate the parental rights of the children's mother, Virginia Stevens.[2] The petitions were filed pursuant to *former* Or. Rev. Stat. § 419.523.[3] On August 24, 1988, Stevens, through his trial counsel, filed written responses denying the material allegations of the petitions. (Responses of Father). By stipulated order filed November 17, 1988, and signed by Stevens' trial counsel, the parties agreed that trial in the case should be set for March 14, 1989. (Stipulated Order Setting Trial).

On February 24, 1989, approximately three weeks before the scheduled trial, Stevens filed a motion seeking the trial court's approval for payment of the following expenses:

> [P]ayment by the State of Oregon directly to the various service providers required of the expenses of trans-

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[1] Both the order of the Oregon Supreme Court denying review and the opinion of the Oregon Court of Appeals are reported. *See State ex rel. Juv. Dept. v. Stevens*, 100 Or. App. 481, 786 P.2d 1296, *rev. denied*, 310 Or. 71 (1990).

[2] The state also filed petitions to terminate the parental rights of Ms. Stevens and Sandy Johnston with respect to their child.

[3] *Former* Or. Rev. Stat. § 419.523 is reprinted as Appendix A attached hereto.

> porting him from the Washington State Penitentiary in Walla Walla, Washington to the Lane County Jail, Eugene, Oregon, and housing him in said jail, and maintaining his presence in the Lane County Circuit Courthouse for the purpose of attending the trial herein, said expenses being presently estimated at no more than $3,685.00.

(Motion for Approval of Expenses, and Alternative Motion to Sever and Postpone Trial). In the alternative, Stevens requested that "trial of his portion of this case" be severed "from that of the other parties and postpon[ed]" until "a reasonable time following [his] release from incarceration." *Id.* In a supporting affidavit, Stevens' trial counsel stated, *inter alia*, that (1) "the only way to transport a federal prisoner from the state penitentiary in Washington to be housed in the Lane County Jail, so he could attend his trial, is to petition for a Writ of Habeas Corpus *ad Testificandum*"; (2) Stevens is indigent and cannot pay the expenses of transportation and security if released from Washington to attend trial in Oregon; and (3) if the court allowed the motion for payment of expenses, she would "immediately prepare and file a Petition for a Writ of Habeas Corpus and other necessary documents." (Affidavit of Father's Counsel).

The state took no position on Stevens' motion for payment of expenses, but it opposed his alternative motion to sever and postpone trial. (Memorandum in Response to Motions). On March 3, 1989, the trial court denied both motions. (Order).[4] Trial on the petitions to terminate the parental rights of Stevens, Sandy Johnston, and Virginia Stevens began, as scheduled, on March 14, 1989 and continued on March 15, 16, 20, 21, 22, 23, and 24. Stevens was represented by counsel throughout the proceedings and he testified by telephone.

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[4] The court's order is reprinted as Appendix D of Stevens' Petition for Writ of Certiorari.

REASONS FOR DENYING CERTIORARI

Stevens' due process claim has two parts. He argues first that Oregon's refusal to provide funds to bring him from the penitentiary in Walla Walla, Washington to the trial in Eugene, Oregon deprived him of his right to be seen by the trial court. He also argues that the state's refusal prevented him from effectively consulting with his trial counsel. (*See* Pet. Cert. 5, 7). The short answer to Stevens' second argument (the claimed inability to consult with his trial counsel) is that the Oregon Court of Appeals rejected the factual premise for that claim. It found that Stevens was not hampered or limited in his ability to consult with his counsel or to participate at trial. *See State ex rel. Juv. Dept. v. Stevens*, 100 Or. App. 481, 487, 786 P.2d 1296, *rev. denied*, 310 Or. 71 (1990). That factual finding is dispositive. *See Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913).

The short answer to Stevens' first argument (the claimed right to be seen by the factfinder) is that it is moot. Stevens' argument fails to recognize that the trial court is not the only factfinder in Oregon termination cases. Under Oregon law, the Oregon Court of Appeals makes an independent factual and legal determination whether a parent's rights should be terminated. *See State ex rel. Juv. Dept. v. Stevens, supra.* The court of appeals hears no live testimony; it bases its decision instead on the cold record created in the trial court. Thus, Stevens was on equal footing with all of the other witnesses before the appellate court, whether or not he had testified by telephone at trial.

Stevens did not argue below, and does not contend here, that his inability to be seen by the Oregon Court of Appeals violated due process. Absent some claim that the appellate court's review was itself constitutionally inadequate, that

court's *de novo* decision provides an independent basis for the judgments terminating Stevens' parental rights. Accordingly, whether the trial court proceeding was constitutionally inadequate is immaterial, at least for the purposes of the validity of the state court judgment. *See Michigan v. Long*, 463 U.S. 1032 (1983) (no jurisdiction where state judgment clearly rests on independent and adequate state ground); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (no jurisdiction over state judgment that may rest on independent and adequate state ground).

Stevens perhaps could question whether the appellate decision was truly independent, and in many cases his question would be appropriate. In reviewing termination cases, the Oregon Court of Appeals customarily gives "due regard to the findings of the trial court," because of the trial court's "opportunity to observe the witnesses." *E.g.*, *State ex rel. Juv. Dept. v. Pennington*, 104 Or. App. 194, 196, 799 P.2d 694 (1990). The problems for Stevens in this case, however, are (1) that the Oregon Court of Appeals found that he had admitted many of the bad acts that Virginia Stevens said he had committed and (2) that even after expressly accepting Stevens' version of events where it conflicted with the mother's, the reviewing court remained convinced, as the factfinder, that Stevens' parental rights should be terminated. *See State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 488.[5]

Because the Oregon Court of Appeals' *de novo* decision provides an independent basis for the state judgment termi-

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[5] In his brief in the Oregon Court of Appeals, Stevens had argued:

> By denying [Stevens] his right to be present during the trial, the [trial] court denied him his rights to personally confront the witnesses against him and to testify in person so that his demeanor and credibility could be properly evaluated. *Since virtually the only witness against [him] was [the] mother, it was critical to the [trial] court's ability to weigh his credibility against hers that the father be able to testify in person.*

(Brief at 25-26; emphasis added).

nating Stevens' parental rights, the Court need not reach the merits of his claimed right to be seen. In any event, as discussed in detail below, Stevens' due process claim lacks merit and is not supported by the record.

I. Stevens must show that his absence impermissibly increased the risk of an erroneous result.

It is beyond dispute that when the state acts to terminate the relationship between a parent and his child, it must do so through procedures that meet the requirements of the Due Process Clause; *i.e.*, "it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). "[U]nlike some legal rules," however, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). What process is "fundamentally fair" in a state termination-of-parental-rights proceeding is determined by applying the standards set out in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *See Santosky v. Kramer*, *supra*, 455 U.S. at 754-68 (due process requires proof by clear and convincing evidence in termination proceedings); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27-31 (1981) (due process does not require appointment of counsel for indigent parents in every termination proceeding; "the decision whether due process calls for the appointment of counsel for indigent parents" in a given case is "to be answered in the first instance by the trial court, subject . . . to appellate review"). The *Mathews* test requires a weighing or balancing of three factors: (1) the private interests "affected by the official action"; (2) the state's interest in using the challenged procedure; (3) the risk that the procedure used will lead to erroneous decisions, "and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, *supra*. *See Santosky v. Kramer*, *supra* 455 U.S. at 754; *Lassiter v. Department of Social*

Services, *supra* 452 U.S. at 27. The question presented in this case turns on third of the *Mathews* criteria.

Stevens' interest "in the accuracy and justice of the decision to terminate" his parental rights "is a commanding one." *See Santosky v. Kramer*, *supra* 455 U.S. at 758; *Lassiter v. Department of Social Services*, 452 U.S. at 27. Because the state "has an urgent interest in the welfare of the child[ren]" involved, "it shares the parent's interest in an accurate and just decision." *Lassiter v. Department of Social Services*, *supra*. The state's interests and Stevens' interests diverge, however, with respect to Stevens' request for funds to pay the estimated transportation and security costs associated with his appearing at trial. The state acknowledges that its pecuniary interest, though legitimate, does not outweigh Stevens' interest in retaining his parental rights. *See Lassiter v. Department of Social Services*, *supra* 452 U.S. at 27-28. The state does not concede, however, that its only interest is financial. Stevens did not request approval for payment of the expenses in question until three weeks before the stipulated trial date, even though the final date had been scheduled for five months. At the time of the request, his trial counsel had not yet filed a petition for a writ of habeas corpus *ad testificandum* to secure Stevens' release from incarceration in Washington; instead, she planned to do so "immediately" if the request for payment of the expenses were allowed. Stevens made no showing that the writ would have been granted before the date of trial, if at all. *See generally* 28 U.S.C. § 2241(c)(5); *Ballard v. Spradley*, 557 F.2d 476, 479-81 (5th Cir. 1977). That lack of certainty implicates the state's obvious strong interest in determining the children's status without undue delay.

The final and dispositive consideration is the degree of risk, if any, that Stevens' parental rights were terminated erroneously because he was not present at trial. *See Lassiter v. Department of Social Services*, *supra* 452 U.S. at

28-32. Oregon law seeks to ensure accurate decisions in termination cases through a number of procedural safeguards. The grounds for termination of parental rights are defined primarily by statute. *See* Or. Rev. Stat. § 419.523. Trial courts are required to appoint an attorney to represent indigent parents who request such assistance. Or. Rev. Stat. § 419.525(2). The hearing on the termination petition is held before a trial court, without a jury, and the facts alleged in support of the petition, "unless admitted, must be established by clear and convincing evidence." Or. Rev. Stat. § 419.525(3). Parents have a right to appeal to the Oregon Court of Appeals from a judgment terminating their rights. Or. Rev. Stat. § 419.561. *See* Or. Rev. Stat. § 419.525(4). The Oregon Court of Appeals reviews *de novo* questions of both fact and law. *See* Or. Rev. Stat. §§ 419.561(4) and 19.125(3); *State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 487. The appellate court will reverse a trial court's termination decision if its independent review of the factual record leads it to conclude that the state failed to prove its case. *See, e.g., State ex rel. Juv. Dept. v. Pennington*, *supra* 104 Or. App. at 201 ("[t]he evidence fails to convince us under [the applicable standard of proof] . . . that integration [of the children] into [the mother's] home is improbable in the foreseeable future," which is a required element under Or. Rev. Stat. § 419.523). Parents may challenge the adequacy of appointed counsel on direct appeal from a judgment terminating their parental rights. *See State ex rel. Juv. Dept. v. Geist*, 310 Or. 176, 187, 796 P.2d 1193 (1990).

The procedural safeguards in a proceeding to terminate parental rights are substantial. Stevens' due process challenge requires him to demonstrate that his absence and the initial factfinder's inability to observe him while he testified impaired the integrity of the factfinder's decision. Put differently, Stevens must show to what degree, if any, his absence

from the termination proceedings increased the risk of an erroneous decision or that his presence would have reduced such a risk. For the reasons outlined below, he has failed to carry that burden.

II. Stevens had a meaningful opportunity to be heard and was effectively represented by trial counsel.

Stevens points to nothing in the record to support his claim that, because of his absence, "he could not effectively consult with or assist his attorney in meeting the government's evidence." (Pet. Cert. at 7). He also ignores the findings of fact by the court of appeals that contradict his claim:

> Stevens testified by telephone and was able to consult with his counsel in the same way. His testimony followed that of the adverse witnesses and responded to it point by point, and his counsel was able to cross-examine the adverse witnesses meaningfully. Those facts suggest that he was able *effectively* to consult with counsel. Indeed, he does not claim that any specific portion of the trial was affected by his absence or that his inability to consult with counsel in person hampered any specific portion of trial preparation or strategy.

State ex rel. Juv. Dept. v. Stevens, *supra* 100 Or. App. at 487 (emphasis in original; footnote omitted).[6]

The record fully supports the appellate court's findings and establishes that, notwithstanding his participation by telephone, Stevens had a full, fair, and meaningful oppor-

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[6] Stevens' suggestion that "the absence of broad civil-type discovery in parental termination hearings" affected the presentation of his case, (Pet. Cert. at 12, n. 6), is a new argument which is both beside the point and without merit. He made no claim in the Oregon Court of Appeals that the state provided less than full discovery, and Or. Rev. Stat. § 419.567 authorizes attorneys for parents to have complete access to the juvenile court's legal and social files concerning children within the court's jurisdiction. Stevens' right-of-confrontation discussion likewise is largely irrelevant. (*See* Pet. Cert. at 9). The Sixth Amendment right of confrontation applies only to criminal cases; there is no similar right in a civil trial.

tunity to challenge the state's evidence and to present his own evidence. He was vigorously represented by competent counsel who was present throughout the proceedings. He does not explain in what respects the evidence that he presented or his counsel's cross-examination of the state's witnesses against him would have been any different had he been present. *See* Tr. March 20, 1989, at 2-33 (cross-examination of caseworker by Stevens' trial counsel); Tr. March 21, 1989, at 8-32 (further cross-examination of caseworker); Tr. March 23, 1989, at 301-14 (cross-examination of Virginia Stevens by trial counsel); Tr. March 23, 1989, at 414-49 and Tr. March 24, 1989, at 473-520 (Stevens' telephone testimony). He does not claim that either he or his attorney requested a recess or continuance to consult during trial or that, had either of them made such a request, it would have been denied. Stevens testified by telephone after the state's witnesses against him had testified, and, through counsel, he introduced numerous exhibits. (*See* Tr. March 23, 1989, at 414-49; Tr. March 24, 1989, at 473-520; Exs. 101-12, 118, 119, 122, 123). At the close of the state's case, his trial counsel successfully moved to strike two of the material allegations of the termination petition against him and part of another for lack of proof, citing, *inter alia*, exhibits that counsel had introduced. (*See* Tr. March 23, 1989, at 379-85; Judgments Terminating Parental Rights and Orders of Permanent Commitment). Stevens makes no claim that his trial counsel was inadequate.

On this record, Stevens has failed to show that his having to participate by telephone caused any prejudice to his counsel's presentation of his case.

III. Stevens has not shown that the trial court's inability to observe Stevens' demeanor affected the result in this case.

Stevens' claim that he was denied due process because the trial court was unable to observe his demeanor is equally with-

out merit. Notwithstanding the obvious significance of a fact-finder's assessment of a witness's credibility, neither in this case, nor in Oregon termination proceedings generally, does the trial court's decision whether to terminate turn on the type of "subjective" or "moral" considerations suggested by Stevens.[7] *See* Or. Rev. Stat. §§ 419.523 and 419.525. (*See also* Judgments Terminating Parental Rights and Orders of Permanent Commitment). Moreover, a trial court may assess the credibility (and character) of a person by means other than observing his demeanor. Stevens does not explain why the trial court could not have made an accurate assessment of his credibility on the basis of his telephone testimony, including his explanation of and responses to the allegations in the termination petitions.

Finally, as discussed *supra* at 3-4, Stevens' argument in support of his claimed due process right to have his demeanor assessed ignores the nature of the Oregon Court of Appeals' review. That court reviewed the record in this case *de novo* and found that the state had established by clear and convincing evidence, that his parental rights should be terminated. The court stated, in pertinent part, as follows:

> [The dissent] assumes, as a matter of fact, that the trial court's inability to evaluate Stevens' demeanor in person was important here, because "[a] key witness adverse to father was the child's mother, who did appear in person." 100 Or App 489. Testimony from witnesses, other than mother, during the lengthy trial bore on Stevens' fitness. Most significantly, Stevens

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[7] *See* Pet. Cert. at 10-11 ("The ability of a trier of fact to judge the moral 'worth' of a person and to predict his or her future conduct demands an intuitive evaluation that cannot adequately be based on mere words."). In addition, the record shows that Stevens had no difficulty testifying fully by speaker phone, although he claims in his brief that such devices were "alien" to him. *See* Pet. Cert. at 10-11 n. 4.

> admitted many of the key facts about which mother testified, including his participation in the manufacture of methamphetamines, his past abuse of drugs and alcohol, and his long criminal history; most recently he had pled guilty to a federal charge of manufacturing marijuana. He admitted that the people with whom he was associating before his incarceration were dangerous to him and his family. Moreover, the trial court clearly viewed mother's testimony with caution, as shown by its termination of her parental rights. *Even if we, on* de novo *review, accepted Stevens' version where it conflicted with mother's, we would still affirm the trial court's decision.* On this record, it is not likely that his absence was in fact critical.

State ex rel. Juv. Dept. v. Stevens, *supra* 100 Or. App. at 488 (emphasis added).

Stevens, in effect, was given a second trial before a new trier of fact. The second trial was *de novo* on the record; *i.e.*, the Oregon Court of Appeals did not observe the demeanor of *any* witness. That court, like the trial court, concluded that the state had proved its case. As the portion of the court of appeals' opinion quoted above demonstrates, the trial court's inability to observe Stevens' demeanor did not affect the ultimate result in this termination proceeding.

IV. Summary

Stevens asserts that the right he claims is a "qualified" one. (*See* Pet. Cert. at 5, 14). Essentially, he concedes that whether due process requires that a parent be present at a termination proceeding, like the right-to-counsel question presented in *Lassiter*, depends upon the circumstances of the particular case. *Compare Santosky v. Kramer*, *supra* 455 U.S. at 757-58. Stevens has failed, however, to demonstrate either that his absence impermissibly increased the risk of erroneous deprivation of his parental rights or that his physical presence in the courtroom would have aided him in the presentation of his case. On this record, consequently, his argument *in sub-*

stance, is that the claimed right is absolute; *i.e.*, that in all cases due process requires that indigent parents be provided the cost of attending termination trials. That is a different argument from the one that he purports to make, and no authority supports it.

Stevens' petition, in the final analysis, raises no significant due process questions. Consistent with this Court's analysis in *Lassiter*, the Oregon Court of Appeals considered Stevens' claimed right to be present in the context of the facts and circumstances of the proceedings in question (including the availability of other methods of presenting his case) and found that his participation by telephone did not affect the fairness or result of the proceedings. The Oregon court's resolution is consistent with other appellate courts' decisions in similar cases.[8]

CONCLUSION

For the foregoing reasons, Stevens' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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[8] *See In re Randy Scott B.*, 511 A.2d 450 (Me. 1986); *In re Juvenile Appeal*, 187 Conn. 431, 446 A.2d 808 (1982); *In the Interest of F.H.*, 283 N.W.2d 202 (N.D. 1979).

APPENDIX A

OREGON REVISED STATUTES

419.523

419.523 Termination of parental rights; grounds. (1) The parental rights of the parents of a child within the jurisdiction of the juvenile court as provided in ORS 419.476(1) may be terminated as provided in this section and ORS 419.525. The rights of one parent may be terminated without affecting the rights of the other parent.

(2) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent or parents is improbable in the foreseeable future due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:

(a) Emotional illness, mental illness or mental deficiency of the parent of such duration as to render it impossible to care for the child for extended periods of time.

(b) Conduct toward any child of an abusive, cruel or sexual nature.

(c) Addictive use of intoxicating liquors or controlled substances.

(d) Physical neglect of the child.

(e) Lack of effort of the parent to adjust the circumstances of the parent, conduct, or conditions to make the return of the child possible or failure of the parent to effect a lasting adjustment after reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

(e) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds

that the parent or parents have failed or neglected without reasonable and lawful cause to provide for the basic physical and psychological needs of the child for one year prior to the filing of a petition. In determining such failure or neglect, the court shall consider but is not limited to one or more of the following:

(a) Failure to provide care or pay a reasonable portion of substitute physical care and maintenance if custody is lodged with others.

(b) Failure to maintain regular visitation or other contact with the child which was designed and implemented to a plan to reunite the child with the parent.

(c) Failure to contact or communicate with the child or with the custodian of the child. In making this determination, the court may disregard incidental visitations, communications or contributions.

(4) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents have abandoned this child or the child was left under circumstances such that the identity of the parent or parents of the child was unknown and could not be ascertained, despite diligent searching, and the parent or parents have not come forward to claim the child within six months following the finding of the child.